



Eileen W. Hollowell

Eileen W. Hollowell, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

9	In re:)	
10	ALAN THEODORE SHIH and)	Chapter 7
11	ZURAIDA ZAINALABIDIN,)	Case No. 4:11-bk-10688-EWH
12	Debtors.)	
13	_____)		
14	NORTH SUMMIT LANDING, INC., a)	Adversary No. 4:11-ap-01470
15	California corporation,)	
16	Plaintiff,)	MEMORANDUM DECISION
17	vs.)	
18	ALAN THEODORE SHIH and)	
19	ZURAIDA ZAINALABIDIN,)	
20	Defendants.)	
	_____)		

I. INTRODUCTION

This adversary proceeding involves whether Debtors' breach of contract with North Summit Landing, Inc. ("NSL" or "Plaintiff") should be declared non-dischargeable

1 under 11 U.S.C. § 523(a)(6).¹ For the reasons explained in the balance of this
2 memorandum, judgment will be entered in favor of the Debtors.

3
4 **II. STATEMENT OF FACTS ***

5 On January 25, 2007, Debtors (through related entities) purchased a Foot
6 Solutions store located at 4444 East Grant Road, and a second location for a store
7 located at 7705 North Oracle, Tucson, Arizona from NSL. The sales price was
8 \$1.2 million, but Debtors were only able to obtain financing for \$900,000. The parties
9 agreed to make up the \$300,000 difference by entering into a consulting agreement
10 (“Consulting Agreement”) under which NSL would be paid \$360,000 over a five-year
11 term at the rate of \$6,000 per month. Debtors made payments until March 1, 2009.
12

13 In early March 2009, when the stores were performing poorly, Debtor Alan Shih
14 (“Shih”) began to consider either breaching or restructuring the Consulting Agreement.
15 On March 14, 2009, Shih sent a settlement offer to NSL’s principal (“Parrish”) proposing
16 lower payments for a longer term. Parrish refused the settlement offer. He offered
17 instead to provide seven different services under the Consulting Agreement to assist
18 Debtors’ flagging stores. Throughout the month of March, Shih consulted with an
19 attorney (“Kramoltz”) about how to achieve a restructure of the Consulting Agreement
20
21

22 * Most of the Statement of Facts are taken from the February 27, 2011 ruling in Arizona
23 Superior Court, Pima County Case No. 20095149, North Summit Landing, Inc. v.
24 Footomaki Tucson, LLC, et al, Plaintiff’s Exhibit D.
25

26 ¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code,
27 11 U.S.C. §§ 101-1532. All “rule” references are to the Federal Rules of Bankruptcy Procedure,
28 Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as “Civil Rules.”

1 and/or to understand the potential consequences of a deliberate default by the Debtors.
2 Among the issues Shih discussed with Kramoltz, were the scope of NSL's damages if
3 Debtors breached the Consulting Agreement, the extent to which NSL would incur legal
4 fees if it had to sue to enforce the Consulting Agreement, whether bankruptcy would
5 result in a zero recovery for NSL and how to put NSL in default before Debtors ceased
6 making payments. In an apparent effort to make NSL default, the Debtors demanded
7 that NSL prepare an "advertising buy" on very short notice. When NSL did not meet the
8 deadline, Shih sent a termination notice to NSL.
9

10 On September 8, 2009, NSL sued Debtors and related parties in Arizona
11 Superior Court ("State Court") alleging breach of contract and seeking a declaratory
12 judgment that the Debtors had breached the Consulting Agreement. On February 7,
13 2010, the State Court ruled in favor of NSL, finding that Debtors' demand for the
14 advertising buy was unreasonable and that Debtors, not NSL, breached the Consulting
15 Agreement. On March 18, 2011, the State Court entered judgment in favor of NSL in
16 the amount of \$224,000 for contract damages and \$220,551.45 for attorneys' fees. On
17 April 15, 2011, the Debtors filed for bankruptcy relief.
18
19

20 **III. ISSUES**

21 Is NSL's claim against the Debtors non-dischargeable under 11 U.S.C.
22 § 523(a)(6)?²
23
24

25 ² Plaintiffs also sought a denial of Debtors' discharge under 11 U.S.C. §§ 727(a)(2)(A),
26 727(a)(3), 727(a)(4)(A) and 727(a)(5). On April 12, 2012, a directed verdict was granted in favor
27 of the Debtors on the 727 claims for the reasons stated on record. Accordingly, this
28 memorandum only addresses NSL's 11 U.S.C. § 523(a)(6) claim.

1 **IV. STATEMENT OF JURISDICTION**

2 Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(b)(2)(I) and (J).

3 **V. DISCUSSION**

4
5 A. 11 U.S.C. § 523(a)(6)

6 Section 523(a)(6) excepts from discharge debts resulting from “willful and
7 malicious injury by the debtor to another entity or the property of another entity.” In the
8 Ninth Circuit, willful intent is either the subjective intent to cause harm or the subjective
9 knowledge that harm is substantially certain to occur. Khaligh v. Hadaegh (In re
10 Khaligh), 338 B.R. 817, 831 (9th Cir. BAP 2006) citing Carillo v. Su (In re Su), 290 F.3d
11 1140, 1144-45 (9th Cir. 2002). Conduct is malicious if the act in question is: (1) wrong;
12 (2) intentional; (3) necessarily causes injury; and (4) is without just cause and excuse.

13 Id.

14
15 In order for a breach of contract to be excepted from discharge under
16 § 523(a)(6), the breach must be accompanied by tortuous conduct. In re Jerich,
17 238 F.3d 1202 (9th Cir. 2001). The Jerich court undertook a two-part inquiry to
18 determine whether a breach of contract falls within § 523(a)(6). First, the debtor’s
19 conduct is reviewed to determine if it was tortuous and, then if it was, a review is
20 undertaken to determine if the tortuous conduct was both willful and malicious. Id. at
21 1206-09. See also Lockerby v. Sierra, 535 F.3d 1038, 1040-41 (9th Cir. 2008).

22
23 B. Tortuous Conduct

24 Arizona law determines whether the Debtors’ conduct was tortuous. In re Bailey,
25 197 F.3d 997, 1000 (9th Cir. 1999) (“while bankruptcy law governs whether a claim is
26 non-dischargeable under § 523(a)(6), this court looks to state law to determine whether
27

1 an act falls within the tort of conversion”). Here, the Plaintiff mistakenly argues that
2 Debtors’ conduct constituted an abuse of process under Arizona law.

3 1. Abuse of Judicial Process

4 Abuse of process requires the misuse of a judicial process. Arizona law defines
5 “process” as a citation, writ or summons issued in the course of judicial proceedings.
6 A.R.S. § 1-215. That same statute defines “action” as “any matter or proceeding in a
7 court civil or criminal” (emphasis added).
8

9 Nienstedt v. Wetzel, 133 Ariz. 348, 353, 651 P.2d 876, 881 (App. 1982), a case
10 cited by the Plaintiff, held that “to establish a claim for abuse of process, there must be
11 a showing that the defendant has (1) used a legal process against the plaintiff;
12 (2) primarily to accomplish a purpose for which the process was not designed; and
13 (3) harm has been caused to the plaintiff by such misuses of process.” See also
14 Houston v. State Board of Education, 2012 WL466474, at *7 (2012) citing Nienstedt,
15 and Morn v. City of Phoenix, 730 P.2d 873, 876 (Ariz. Ct. App. 1986) (“abuse of process
16 is an act done under authority of the court”).
17
18

19 Although Nienstedt defined “process” broadly to encompass “the entire range of
20 procedures incident to the litigation process, this broad reading is not boundless. First,
21 “the entire range of procedures” is meant to “cover[] the allegedly improper use of
22 individual legal procedures,” not “the whole of a lawsuit.” Crackel v. Allstate Ins. Co.,
23 92 P.3d 882, 887 (Ariz. Ct. App. 2004) rejected the plaintiff’s assertion that “an abuse of
24 process claim may be based on the worthiness of the litigation ‘process as a whole.’”
25 Instead, the Crackel court held that “a plaintiff must prove that one or more specific
26 judicially sanctioned processes have been abused to establish an abuse-of-process
27

1 claim” (emphasis added). A claim could not be “predicated on the litigation process as
2 a whole or on a defendant’s mere refusal to settle.” It is not enough, the court
3 concluded, “to establish that the defendant had possessed an improper purpose in
4 sustaining the overall litigation.” Id.

5
6 The core of Plaintiff’s argument is that Shih committed a tort because he used,
7 or tried to use, the threat of litigation and its attendant costs to make NSL restructure
8 the Consulting Agreement. But, none of the Defendants’ actions involved the use of a
9 court process, which is a necessary element of the tort. The evidence submitted
10 indicates that Debtors attempted to play “hard ball” in negotiations with NSL, including
11 making NSL aware of the costs of litigation if the Consulting Agreement was not
12 restructured. The email exchanges between Shih and his lawyer are evidence that Shih
13 was exploring all options with respect to the Consulting Agreement, including how best
14 to deliberately breach the Consulting Agreement. But, deliberate breaches of contract
15 are not torts. As the Lockerby court noted:

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18 The concept of “efficient breach” is built into our system of
19 contracts, with the understanding that people will sometimes intentionally
20 break the contracts if for no other reason than that it benefits them
21 financially.” 535 F.3d at 1042.

22 Furthermore, even assuming that there can be an abuse of process independent
23 of a court process, Arizona courts have recognized that undertaking litigation in order to
24 compel a settlement is a legitimate purpose of process, not an improper one. See
25 Grabinski v. Nat’l Union Fire Ins. Co. of Pittsburgh, 2005 WL 2412784, at *5 (D. Ariz.
26 2005) (allegation that appeal was taken “to force a settlement will not support an abuse
27 of process claim”); Bird v. Rothman, 627 P.2d 1097, 1100 (Ariz. Ct. App. 1981)

1 (defendants did not abuse process by bringing the plaintiffs into the underlying lawsuit
2 simply to force a settlement because “the purpose of settlement . . . is includable in the
3 goals of proper process”).

4
5 The cases relied upon by the Plaintiff are distinguishable because they involved
6 the use of court procedures. In Nienstedt, the defendant filed a counterclaim, multiple
7 motions and engaged in discovery abuses. In Crackel, 208 Ariz. 252, 92 P.3d 882
8 (Ariz. App. Div. 2 2004), the defendant’s conduct at a mandatory settlement conference
9 ordered by the Superior Court was found to be an abuse of process.

10
11 In contrast, the Debtors never used any court procedures in trying to restructure
12 or breach the Consulting Agreement. They merely engaged in negotiation tactics which
13 included using the threat of the cost of litigation to force a settlement. But, the cost of
14 litigation is a legitimate factor to be considered in every dispute, including contract
15 disputes. Lawyers routinely discuss litigation costs in negotiations to resolve disputes
16 before litigation ever begins. In short, there was no abuse of judicial process by the
17 Debtors because there was no use of judicial process.

18
19 2. Improper Motive

20 In the unlikely event that Debtors’ pre-litigation effort to force Plaintiff to settle by
21 using the potential cost of litigation as a negotiation tactic to incur legal fees, was a use
22 of judicial process. Plaintiffs could still not prevail.

23 Abuse of process requires the Plaintiff to prove that the Debtors acted for an
24 improper purpose. This requirement recognizes that parties and their lawyers often
25 have mixed motives in undertaking an act in litigation. Thus, the Restatement of Torts
26 defines abuse of process as process used “primarily to accomplish a purpose for which
27

1 it is not designed.” Restatement (Second) of Torts § 682 (1977). Under the
2 Restatement, “there is no action for abuse of process when the process is used for the
3 purpose for which it is intended, but there is an incidental motive of spite or an ulterior
4 purpose of benefit to the defendant.” Id. § 682 cmt. b; see Pankratz v. Willis, 744 P.2d
5 1182, 1196 (Ariz. Ct. App. 1987) (“Where a lawful end is pursued by appropriate
6 process, incidental motives of spite or greed are not actionable.”).

7
8 To prove abuse of process, it is insufficient to show that the defendants allegedly
9 engaged in conduct to wear down the plaintiffs and force them to accept the defendants’
10 settlement offers. As the Nienstedt court recognized “the utilization of virtually any
11 available litigation procedure by an attorney will generally be accompanied by an
12 awareness on that attorney’s part that his action will necessarily subject the opposing
13 party to additional legal expense.” 651 P.2d 876, 882 (Ariz. Ct. App. 1982).
14 Nevertheless, neither “actual indifference” nor “intense satisfaction” with this result
15 suffices for abuse of process. Id. If the defendant would have used the same judicial
16 procedure, even without an improper motive, the improper motive is not “primary” and,
17 therefore, not actionable. As the Crackel court explained “plaintiffs must not only
18 present evidence that the defendant used a court process for a primarily improper
19 purpose, they must also show that, in using the court process, the defendant took an
20 action that could not logically be explained without reference to the defendant’s
21 improper motives.” 92 P.3d at 889.
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23

24 In this case, Debtors’ conduct can be logically explained. They were not just, or
25 even primarily, seeking to make the Plaintiff incur legal expenses, they were seeking to
26 restructure the debt or “efficiently breach” the Consulting Agreement.
27

1 **VI. CONCLUSION**

2 Plaintiff has not demonstrated that Defendants' conduct constituted the use of a
3 court process, therefore, they cannot demonstrate that Defendants committed the tort of
4 abuse of process under Arizona law. Even if the Debtors' conduct was a use of a court
5 process, the evidence does not demonstrate that Defendants' conduct met Arizona's
6 requirement that it be solely based on an improper motive. Accordingly, a judgment in
7 favor of the Debtors will be entered this date.
8

9 Dated and signed above.

10 Notice to be sent through the Bankruptcy
11 Noticing Center "BNC" to the following:

12 Isaac D. Rothschild
13 Mesch, Clark & Rothschild, PC
14 259 North Meyer Avenue
15 Tucson, AZ 85701

16 Dennis M. Breen, III
17 Breen, Olson & Trenton, LLP
18 6818 North Oracle Rd., Suite 420
19 Tucson, AZ 85704-4261

20 Beth Lang
21 1955 West Grant Rd., Suite 125
22 Tucson, AZ 85745
23
24
25
26
27
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